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In the Supreme Court of the United States

OCTOBER TERM, 1973

FRIENDS OF THE EARTH, WASATCH MOUNTAIN CLUB, INC., and KENNETH G. SLEIGHT,

Petitioners,

v.

GILBERT R. STAMM, Commissioner, Bureau of Reclamation, and ROGERS C. B. MORTON, Secretary of the Interior,

Respondents,

and

STATE OF COLORADO, STATE OF UTAH, COLORADO RIVER WATER CONSERVATION DISTRICT, SOUTHWESTERN WATER CONSERVATION DISTRICT, INTER-MOUNTAIN CONSUMER POWER ASSN., NORTHERN DIVISION POWER ASSN., INC., CENTRAL UTAH WATER CONSERVANCY DISTRICT, and COLORADO-UTE ELECTRIC ASSOCIATION,

Intervenors-Respondents.

BRIEF IN OPPOSITION FOR INTERVENORS-RESPONDENTS STATE OF COLORADO, STATE OF UTAH, INTER-MOUNTAIN CONSUMER POWER ASSN., NORTHERN DIVISION POWER ASSN., INC., CENTRAL UTAH WATER CONSERVANCY DISTRICT, AND COLORADO-UTE ELECTRIC ASSOCIATION

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QUESTION PRESENTED

Whether the Court of Appeals for the Tenth Circuit erred in construing the composite web of Colorado River Storage

Project legislation[1], and seventeen years of legislative history relating thereto, to authorize operation of the Glen Canyon Unit (Lake Powell) at its designed and constructed capacity.

STATEMENT OF THE CASE

Petitioners (plaintiffs below) brought this action for declaratory relief and to enjoin the Secretary of the Interior and the Commissioner of the Bureau of Reclamation from allowing the waters of Lake Powell, stored behind Glen Canyon Dam on the Colorado River, to back up Bridge Creek within the boundaries of Rainbow Bridge National Monument. Intervenors-respondents are states in the Upper Basin of the Colorado River, power associations and water conservancy districts, all of which are statutory beneficiaries of the Colorado River Storage Project. Petitioners and all respondents submitted the case in the District Court on cross motions for summary judgment, supported by numerous affidavits, attached tables, reports and other materials, containing voluminous references to Congressional hearings and Committee reports on the Colorado River Storage Project of 1956, 43 U.S.C. §620 (the "1956 Act") and the Colorado River Basin Project Act of 1968, 43 U.S.C. §1501 (the "1968 Act") and to the actions of Congress taken over the seventeen year period since 1956 in planning, authorizing and implementing the Colorado River Storage Project.

Lake Powell was authorized by Section 1 of the 1956 Act as a river regulating reservoir, "making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact . . . ." 43 U.S.C. §620.

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[1]Colorado River Storage Project Act of 1956, 43 U.S.C. §620; Colorado River Basin Project Act of 1968, 43 U.S.C. §1501; and authorization and appropriation acts for construction and operation of Colorado River Storage Project units, participating projects and use facilities. Pertinent sections of these acts are cited in the Petition for Certiorari and in the opinion of the Court of Appeals attached as Appendix B to the Petition.

The construction of Glen Canyon Dam was completed in 1963. The Glen Canyon Unit was designed to a maximum elevation of 3700 feet above mean sea level with a total storage capacity of 27 million acre feet, or approximately four times the capacity of all other mainstem regulating projects in the Upper Basin. Water began filling Lake Powell in 1963, first entered Rainbow Bridge National Monument on May 15, 1971 and has been within the Monument at all times thereafter except for brief draw-down periods. Water enters the Monument at an elevation of 3606 feet; at 3654 feet the water reaches a point in the gorge of Bridge Creek beneath the arch known as "Rainbow Bridge"; and at 3700 feet water stands 46 feet deep in Bridge Creek gorge and 25 feet below the base of the foundations of the arch. If restricted to an elevation of 3606 feet above mean sea level, the storage capacity of Lake Powell would be 12.7 million acre feet. Active storage in Lake Powell, at full capacity, is approximately equal to the storage capacity of Lake Mead, a similar river regulating reservoir in the Lower Basin of the Colorado River.

By reason of the fact that Lake Powell was to be so situated that its waters would ultimately back up Bridge Creek into the Rainbow Bridge National Monument, Congress, at the time of enacting the 1956 Act, added the following proviso to Section 1:

> That as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument. 43 U.S.C. §620.

Commencing in 1960, hearings were held before House and Senate committees on requests of the Secretary of the Interior for appropriations to construct protective works. Congress denied such requests, and in each year thereafter, added a condition to each appropriation act for the Department of the Interior substantially as follows:

> Provided, That no part of the funds herein appropriated shall be available for construction or operation of facilities

> to prevent waters of Lake Powell from entering any National Monument.[2]

This proviso was included in the appropriations acts for 1972 and 1973, which were enacted after water had entered the Monument.

Reports of the House Committee in 1960 explained the purpose of the fund restrictions as follows:

> This action deletes the funds programmed for protection of the Rainbow Bridge National Monument . . . . The geological examination report on the problem indicates clearly that there will be no structural damage to Rainbow Bridge *by the reservoir waters beneath it* (emphasis added). H. Rep. 1634, 86th Cong. 2d Sess. (1960), p. 31.

And in the Senate Report:

> In taking this action the committee has considered the findings of the Geological Survey that the impoundment of waters in the Glen Canyon Reservoir (Lake Powell) will not result in any structural damage to the Rainbow Bridge. S. Rep. 1763, 86th Cong. 2d Sess. (1960), p. 38.

The 1968 Act authorized the Central Arizona Project and other participating projects, provided operating criteria for Lake Powell and contained the following directives:

> Provided, That any capacity in the Granite Reef aqueduct in excess of 2,500 cubic feet per second shall be utilized for the conveyance of Colorado River water only when Lake Powell is full or releases of water are made from Lake Powell to prevent the reservoir from exceeding elevation 3700 feet above mean sea level . . . . 43 U.S.C. §1521(a).

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[2]Opinion of the Court of Appeals, "Appendix B" to the Petition, at pgs. LXIV-LXV.

And:

> [directing Secretary to prepare and file operating criteria with Congress that would limit releases of water from Lake Powell to the following situations, other than for calls under the Colorado River Compact] (i) to the extent it can be reasonably applied in the States of the Lower Division to the uses specified in article III(e) of the Colorado River Compact, but no such releases shall be made when the active storage in Lake Powell is less than the active storage in Lake Mead, (ii) to maintain, as nearly as practicable, active storage in Lake Mead equal to the active storage in Lake Powell, and (iii) to avoid anticipated spills from Lake Powell. 43 U.S.C. §1552.

These operating criteria cannot be satisfied if the level of Lake Powell were kept at or below an elevation of 3606 feet. Appendix B, at p. LXX. The Central Arizona Project and other participating projects, authorized in the 1968 Act and prior thereto, are dependent for their feasibility upon the operation of Lake Powell at full capacity. Appendix B, at pgs. LXV-LXVI.

Petitioners acknowledge that the proviso in Section 1 of the 1956 Act has been suspended (Petition, at p. 12). They no longer look to the specific Section 1 proviso as a manifestation of present legislative purpose; rather they look to the general declaration of intention in Section 3 of the 1956 Act, which states:

> It is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument. 43 U.S.C. §620(b).

This statement was contained in a section of the Act relating to further studies and future authorizations of participating projects; it contained no specific reference to Lake Powell.

Petitioners have related to this Court that eight bills have been introduced in Congress between 1956 and the present date to exclude Lake Powell from the scope of Section 3 of the 1956 Act. None of these bills were reported out of committee; no committee report exists on any of the bills making

a recommendation for enactment; none of the bills were debated in either House or Senate; and no official action has been taken by Congress to either pass or defeat them.

The District Court entered summary judgment for petitioners and ordered the federal respondents to remove the water from within the boundaries of Rainbow Bridge National Monument. The Court of Appeals stayed the judgment and order pending an expedited hearing before the Court, sitting en banc. After hearing, the Court of Appeals vacated and set aside the judgment of the District Court and remanded the case with directions that jurisdiction be retained by the District Court for ten years for further action if the depth of water in the Monument should significantly exceed present projections or if structural damage to Rainbow Bridge should become evident.

ARGUMENT

It is respectfully submitted that the holding of the Court of Appeals was not predicated on the narrow question whether Section 3 of the 1956 Act has been repealed or suspended, as argued by petitioners; the broader question in this case, and the one considered by the Court of Appeals, is whether Congressional action in 1956 and subsequent thereto, when viewed in its totality, provides a basis for finding that Congress has elected, consistent with its plenary authority over the public domain under article IV, section 3 of the Constitution, to allow the entry of waters into Rainbow Bridge National Monument.

The Court of Appeals concluded from its examination of the legislative history of the 1956 Act, and legislation enacted in *pari materia* in the seventeen years subsequent to the 1956 Act, that Congress now intends that Lake Powell be operated "to the full extent of its design capacity as now constructed in all respects" (Appendix B, at p. LXXI), and supported this conclusion by the following manifestations of Congressional intent:

(a) The denial, in every year since 1960, of funds for the construction of protective works for Rainbow Bridge National Monument;

(b) The appropriation of funds in years subsequent to 1960 for the construction of Lake Powell at a design elevation of 3700 feet, notwithstanding the prior denials of funds for the construction of protective works;

(c) The authorization of other mainstem regulating projects and participating projects on the Colorado River system, the engineering and economic feasibility of which depend upon the operation of Lake Powell at full capacity; and

(d) Its direction in the 1968 Act to the Secretary of the Interior, to adopt operating criteria for Lake Powell, which, if adopted in accordance with the standards set by statute, assume the operation of Lake Powell at full capacity.

If principles governing implied repeal are applicable, however, the decision of the Court of Appeals is not inconsistent with prior decisions of the United States Supreme Court and other federal courts. There are no Supreme Court of lower court cases, cited in the Petition or otherwise existing, holding that an implied repeal cannot occur by a subsequently enacted appropriations bill or by other acts of Congress. On the contrary, the cases of *United States v. Dickerson*, 310 U.S. 554 (1940) and *United States v. Mitchell*, 109 U.S. 146 (1883) expressly hold that a denial of appropriations, requisite to implementation of an earlier act, can have the effect of repealing the earlier act. The only limitation in these cases is that the denial of funds or other act must be clearly inconsistent with the purpose of the prior enactment. Apart from patent inconsistencies with the declaration of intent in Section 3 of the 1956 Act manifested by provisions of the 1968 Act contemplating operation of Lake Powell at full design capacity (43 U.S.C. §1521(a) and §1552), can there be any clearer inconsistency than language in Section 3 on the one hand declaring an intent that "no dam or reservoir . . . shall be within any national park or monument" and the language in 14 subsequent appropriation acts on the other that appropriated funds not be used "to prevent waters of Lake Powell from entering any national monument".

If Congress elected, subsequent to 1956, to authorize the construction of Lake Powell to its full capacity, to prevent the construction of the protective works initially contemplated by Section 1 of the 1956 Act and to permit the entry of water into Rainbow Bridge National Monument, then, notwithstanding any contrary declaration of intent in Section 3 of the 1956 Act or any inconsistent pledges by sponsors of the 1956 Act to opponents thereof, Congress had ample power under the Constitution to do so.

Intervenors-respondents respectfully submit that this case is not suitable for review on certiorari. It involves no question of law in which there is a conflict between the circuits or with any decision of this Court. Even *Posadas v. National City Bank*, 296 U.S. 497 (1936), on which petitioners principally rely, says that:

> The question whether a statute is repealed by a later one containing no repealing clause, on the ground of repugnancy or substitution, is a question of legislative intent to be ascertained by the application of the accepted rules for ascertaining that intention. 296 U.S. at 504.

This case involves no question of federal law of general applicability; it is concerned only with the application of Colorado River legislation to the construction and operation of Lake Powell. Whatever Congress may have intended by its declaration of intent in Section 3 of the 1956 Act (that no dam or reservoir be constructed within any national park or monument), and whatever the ultimate decision in this case may be, Congress can and will determine on a case by case basis in the future whether any particular project will be authorized for construction and operation within any national park or monument.

This is not a case on which the Supreme Court need speculate further on Congressional intention. The Court of Appeals, sitting en banc, has made a determination as to that intention for Lake Powell, by application of the accepted rules for ascertaining the intention of Congress. If Congress had a contrary intention or for that matter elects to change its in-

tention for the protection of some public interest, it can alter the impact of the decision by authorizing protective works for the Monument, limiting active storage in Lake Powell, or altering the operating criteria that now require, in the judgment of the Court of Appeals, encroachment of water into Rainbow Bridge National Monument. It has not taken any such action. Quite to the contrary, we submit, it has ratified and affirmed the interpretation by the Court of Appeals of Congressional intent by once more enacting, subsequent to the date of the Court of Appeals decision, a proviso in the 1974 Appropriations Act that no appropriated funds be used for construction or operation of facilities to prevent the waters of Lake Powell from entering any national monument.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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